



NORTHERN DAKOTA COUNTY CABLE
COMMUNICATIONS COMMISSION
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August 20, 2018

VIA ECFS

Marlene H. Dortch, Esq
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: NCTA June 11, 2018 Letter in Wireline Infrastructure, WC Docket No. 17-84

Dear Ms. Dortch:

This letter is in response to the June 11, 2018 letter of Rick Chessen of NCTA to you (the "Letter") requesting twelve separate rulings¹ from the Commission on issues related to the regulation of cable service by local governments. If acted upon, NCTA's requests would have broad and far-reaching effect: the Northern Dakota County Cable Communications Commission ("NDC4") and other local governments would lose significant control over the management of public rights-of-way, and the public would be denied fair and reasonable compensation for the use of public property. Both outcomes are contrary to federal law.²

NDC4 is a Minnesota municipal joint powers cooperative formed by the seven cities of Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul consisting of a combined total of 54.25 square miles, 35,205 housing units and 85,993 residents. Since 1982 NDC4 has administered and enforced cable franchise ordinances for its members.

NCTA proposes a dramatic change to the existing regulatory construct in order to "reduce or eliminate obstacles to broadband deployment."³ Yet, the existing regulatory construct has resulted in "[t]he cable industry [being] a leader in the deployment of broadband infrastructure,"⁴ investing over \$275 billion to deploy broadband networks that serve over 66 million cable broadband customers.⁵ Clearly there is a disconnect between the claims in the Letter and the facts on the ground. This disconnect highlights a significant concern with NCTA's request, namely, that NCTA is encouraging the Commission to implement radical changes without the benefit of a full and complete record, details of the current regulatory regime or an accurate description of the current law.

¹ See Exhibit A.

² 47 U.S.C. §§ 253(d), 542(b), 556(a).

³ Letter, p. 1.

⁴ Letter, p. 1.

⁵ <https://www.ncta.com/broadband-by-the-numbers>.

A full and fair examination of the record and applicable law will make apparent that NCTA's requests are inappropriate. NDC4 and other local governments have a legitimate and congressionally-recognized interest in regulating public rights-of-way. Far from being a "profit center,"⁶ fees for access and use of the public rights-of-way appropriately cover the cost incurred by local governments from exercising the important management function protected by federal law and compensate the public for use of its property by private businesses. NDC4 respectfully requests the Commission not act on NCTA's letter.

I. THE COMMISSION NEEDS AN ACCURATE AND COMPLETE UNDERSTANDING OF THE FACTS AND LAW TO RULE ON THE 12 SEPARATE ITEMS IDENTIFIED BY NCTA.

NCTA contends that the Commission should dramatically alter the existing regulatory framework based on the actions of *some* local governments.⁷ Even if one accepted NCTA's characterization of the actions of these local governments,⁸ the behaviors of a few do not justify the sweeping changes sought in the Letter. This is especially true when NCTA acknowledges that "*many* local governments are supportive of the cable industry's deployment of new facilities and new services...."⁹ NDC4 is proud to be part of the many local governments that support broadband deployment. NCTA's assertion that regulatory reform is necessary due to the actions of *some* local governments is further undermined by the fact that NCTA's members have invested \$275 billion in the last 20 years under the existing regulatory framework.¹⁰ The Commission should not take up NCTA's request without the benefit of a full, complete and accurate record of existing regulatory policies and the results of these policies nationwide. The vague references in the NCTA letter are not sufficient basis for action.¹¹

Importantly, the Commission's Wireline Infrastructure Docket does not provide the evidentiary basis for assessing NCTA's claims. The Commission's ongoing inquiry into state and local laws affecting broadband deployment does not adequately reflect that existing regulations related to the provision of cable service and access to the public rights-of-way by cable operators are very different than those governing telecommunications providers. The differences are a result of different legal constructs codified in federal, state and local laws. The ongoing Wireless Infrastructure Docket suffers from similar limitations. Any assessment by the Commission should draw upon the cable regulatory regime.

Finally, assessment of the cable regulatory regime would account for the current law. In contrast to the Letter, the current status of the law is that local governments are not barred from

⁶ Letter, p. 9.

⁷ Letter, p. 1 (emphasis added).

⁸ NDC4 has not assessed the validity of the assertions made by NCTA on page 5 of the Letter.

⁹ Letter, p. 1 (emphasis added).

¹⁰ <https://www.ncta.com/broadband-by-the-numbers>.

¹¹ Letter p. 5 (going no further than identifying states in which potentially problematic actions have occurred).

regulating the provision of non-telecommunications services by incumbent cable providers.¹² The Letter does not provide adequate basis for departing from the existing law.

II. LOCAL GOVERNMENTS HAVE A LEGITIMATE INTEREST IN REGULATING PUBLIC RIGHTS-OF-WAY.

Federal law confirms that NDC4 and other local governments retain the ability to regulate public rights-of-way in order to protect public health, safety, and welfare of their citizens.¹³ NCTA asks the Commission to radically restrict these federally-guaranteed rights. Specifically, NCTA requests that “new facilities to be installed as part of a franchised cable system in the public right-of-way [] be subject only to generally applicable permit provisions addressing time, place and manner of access for construction that will disrupt use of the right-of-way.”¹⁴ This change, if adopted, could severely restrict local regulation of the public rights-of-way. For example, a local government may be prohibited from requiring undergrounding, as such regulations may not be related to the time, place and manner of access for construction. Similarly, local governments with unique geological (i.e. lakefront or riverside) or historical characteristics may not be able to protect these features by managing use of the public rights-of-way, in direct contrast to their obligation to tend to the health, safety and welfare of citizens.

The severe restrictions sought by NCTA are even more troubling when combined with its assertions that cable operators should be granted the right to piggyback on their cable franchises to provide non-cable services.¹⁵ According to NCTA, a franchise authority to build a cable system “includes authority to install and operate ... communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.”¹⁶ If true, there would be nothing to stop a cable operator from lining residential streets with “communications equipment to provide additional non-cable services” like 150 foot monopoles, 6 foot square utility boxes and backup generators. Such an outcome is clearly at odds with federal law.

III. THE PUBLIC AND LOCAL GOVERNMENTS ARE ENTITLED TO COMPENSATION FOR THE USE OF VALUABLE PUBLIC PROPERTY.

Public rights-of-way belong to the citizens, not private businesses.¹⁷ Although States may choose to allow private parties to use public rights-of-way, States cannot “abdicate [their] trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties....”¹⁸ Fulfilling the obligation to hold public property in trust

¹² *Montgomery County, Maryland v. Federal Communications Commission*, 863 F.3d 485, 493 (6th Cir. 2017).

¹³ 47 U.S.C. §§ 253(c), 556(a).

¹⁴ Letter, p. 9.

¹⁵ Letter, p. 2-3.

¹⁶ Letter, p. 6.

¹⁷ *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

¹⁸ *Id.* at 453.

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requires securing fair and reasonable compensation for the use and management of public rights-of-way.

Congress has determined that a franchise fee of up to 5% of gross revenues is fair and reasonable compensation for the use of public rights-of-way *for the operation of a cable system to provide cable services*.¹⁹ Congress has made no such determination that the payment of the 5% cable franchise fee is fair and reasonable compensation for the use of the public rights-of-way to operate equipment that is not part of the cable system (because it is not designed to provide cable service) to provide non-cable services. Given the extraordinary requests made by NCTA, it is clear that the public rights-of-way have extraordinary value to cable operators and others. It is inappropriate for that value to be taken from the citizens and transferred to private businesses.

In addition to making sure citizens receive appropriate value for the use of their property, the seven Member Cities of NDC4 and other local governments have the responsibility to manage the public rights-of-way.²⁰ There are costs associated with those management activities, costs that are increasing given the numerous demands being placed on the public rights-of-way to facilitate broadband deployment. In Minnesota, these costs include receiving, evaluating, and processing registration requests and rights-of-way permits.²¹ Local governments' responsibilities do not end once access is approved; there is ongoing monitoring and evaluation to make sure that private parties are not diminishing the public's use of the rights-of-way or interfering with each other. These are all legitimate costs that should be borne not by the citizens, but rather by the operators that are profiting by their private use of these public assets.

IV. CONCLUSION

NDC4 appreciates the opportunity to contribute to the dialogue on these issues. The Letter provides an insufficient basis for issuing the rulings requested by NCTA. If the Commission decides to consider NCTA's requests, NDC4 looks forward to participating in the development of a full, complete and accurate record for the Commission's assessment. We are confident that if such a record is developed, it will be clear to the Commission that NCTA's requests should not be granted.

Sincerely,



George Tourville

Mayor Inver Grove Heights, MN, and Chair NDC4 Cable Commission

¹⁹ 47 U.S.C. § 542(b).

²⁰ Tabin Berger, Brian, Local Coalition Defends Rights-of-Way Management, Compensation Practices, Government Finance Review 73, 74 (August 2011), available at http://www.gfoa.org/sites/default/files/GFR_AUG_11_73_0.pdf.

²¹ Minn. Stat. § 237.163, subd. 2 (b)(1) and (2).

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cc (via email):

U.S. Senator Amy Klobuchar
U.S. Senator Tina Smith
U.S. Representative Jason Lewis

Mike Lynch, President, National Association of Telecommunications Officers and
Administrators (NATOA)
Janine Hill, President, Minnesota Association of Community Telecommunications
Administrators (MACTA)

Angelina Panettieri, Principal Associate, National League of Cities
Gary Carlson, IGR Director, League of Minnesota Cities

The Honorable Warren Peterson, Mayor, City of Lilydale
The Honorable Brian Mielke, Mayor, City of Mendota
The Honorable Neil Garlock, Mayor, City of Mendota Heights
The Honorable James Francis, Mayor, City of South St. Paul
The Honorable Dan O'Leary, Mayor, City of Sunfish Lake
The Honorable Jenny Halvorson, Mayor, City of West St. Paul

Mickey Kieffer, Vice Chair, NDC4 Cable Commission
Richard Jackson, Treasurer, NDC4 Cable Commission
John Bellows, City of West St. Paul Council Member, Secretary, NDC4 Cable Commission
JoAnne Wahlstrom, City of Sunfish Lake Council Member, Executive Committee At-Large,
NDC4 Cable Commission
Bill Kleinman, City of Lilydale Council Member, NDC4 Cable Commission
Melody Rasmussen, City of Mendota Council Member, NDC4 Cable Commission
Joel Paper, City of Mendota Heights Council Member, NDC4 Cable Commission
Todd Podgorski, City of South St. Paul Council Member, NDC4 Cable Commission
Josh Feit, NDC4 Cable Commission
Mike Kampmeyer, NDC4 Cable Commission
James Rasmussen, NDC4 Cable Commission
Ginger Simek, NDC4 Cable Commission
Jane Zaspel, NDC4 Cable Commission

Exhibit A

12 Rulings Requested by NCTA

1. Clarify that local authorities may not require additional franchises, fees, conditions or authorizations beyond a Title VI cable franchise and routine, straightforward permits for the placement of the cable system (and equipment attached thereto) in the public right of way, or for the offering of new services over such facilities.
2. Confirm that authority to build a "cable system," as defined in Section 602 includes authority to install and operate, as part of the cable system, communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.
3. State that local authorities may not require cable operators to obtain separate authorization beyond the cable franchise for placement of small wireless equipment on a cable system.
4. Reaffirm that the federal 5% cap on cable service franchise fees for use of the public right of way for the provision of cable and non-cable services.
5. Declare that a franchising authority a franchising authority cannot refuse to process permit requests on the ground that the equipment can be used for non-cable services, including wireless services.
6. Declare a provider may not be required to obtain additional approval or consent from the franchising authority, other than generally applicable traffic control permits, for lashing communications facilities to facilities already installed under a cable franchise.
7. Declare new facilities to be installed as part of a franchised cable system in the public right-of-way may be subject only to generally applicable permit provisions addressing time, place and manner of access for construction that will disrupt use of the right-of-way and should be processed in a timely manner.
8. Declare any fees for routine permits should be limited to the actual cost of processing and reviewing the permit.
9. Adopt a declaratory ruling that, in addition to their rights under state property law, franchised cable operators have the right under Section 621(a)(2) to utilize compatible utility easements, regardless of the services provided over the cable system.
10. Rule that owners of private easements may not engage in discriminatory behavior or restrict a franchised cable operator's rights to utilize compatible easements for such purposes.
11. Cable operators should have access to easements under the terms and conditions of existing easement agreements, without being required to negotiate a new agreement with the grantor of the easement
12. Find any costs incurred by a cable operator and not reimbursed by a franchising authority in connection with any discriminatory forced relocation of facilities are considered franchise fees for purposes of Title VI.